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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 137

LURTON LEWIS HEFLIN, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The decree of the United States District Court for the Northern District of Alabama, denying petitioner's motion for correction of sentence[1] (R. 20) is not reported. The opinion of the United States Court of Appeals, affirming, is reported at 251 F. 2d 69; that Court's prior opinion upon original appeal is reported at 223 F. 2d 371.

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[1] The motion was filed under Rule 35, Federal Rules of Criminal Procedure and, alternatively, under 28 U.S.C. 2255.

Jurisdiction

Judgment of the Court of Appeals was entered January 24, 1958. A petition for certiorari and motion for leave to proceed *in forma pauperis* were filed in this Court on March 31, 1958; both were granted on June 30, 1958. Jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Can a defendant be punished twice under the Federal Bank Robbery Act, Title 18, U.S.C. Section 2113 (hereinafter called the Act) because his culpable conduct violates the provisions of both subsection (d) and subsection (c) of the Act?

2. Was petitioner properly sentenced under the Act to serve consecutive sentences upon (1) a count charging the offense of bank robbery during the commission of which assault by weapon was committed, and (2) a count charging the receipt, etc., of the money taken in the same robbery?

3. Are bank robbery on the one hand, and receipt and handling of the stolen money on the other, consecutively punishable under the Act in a typical bank robbery situation?

4. Was petitioner subjected to double jeopardy, contrary to the Fifth Amendment, by two punishments imposed upon him as taker and receiver of identical money in a single bank robbery?

Statute and Constitutional Provisions Involved

Title 18, U.S.C. Section 2113 (consolidating sections 588 (a), 588 (b), and 588 (c) of Title 12, U.S.C., 1940 ed.) provides:

"Sec. 2113. *Bank robbery and incidental crimes*

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank or any savings and loan association; or

"Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States or any larceny—

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

"(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or posses-

sion of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

"(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

"(f) As used in this section the term 'bank' means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

"(g) As used in this section the term 'savings and loan association' means any Federal savings and loan

association and any savings and loan association the accounts of which are insured by the Federal Savings and Loan Insurance Corporation."

The Fifth Amendment to the Constitution of the United States provides, in part:

"No person shall . . . be subject for the same offense to be twice put in jeopardy . . ."

Statement

Petitioner was convicted for violation of the Federal Bank Robbery Act. He was originally convicted on four substantive counts and one of conspiracy. Convictions on two counts were reversed on appeal to the Fifth Circuit Court of Appeals taken by other counsel appointed by the District Court;[2] three were affirmed. Petitioner did not take further direct appeal.

His motion for correction of his sentence, under consideration here, was filed *pro se.*

Present counsel for petitioner was appointed by this Court on October 16, 1958.

Petitioner is now serving sentences on three counts providing consecutive terms of ten years (aggravated bank robbery), three years (conspiracy), and one year and a day (receiving stolen money) all relative to the same bank robbery.[3] The courts below have denied his motion to correct his sentence. His motion alleges that he has been subjected to multiple punishment for the same offense in

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[2] The Government admitted error in petitioner's convictions for larceny and robbery under two separate counts based on the same taking of bank funds.

[3] These three counts are based upon subsection (d) of the Act, Title 18, U.S.C. 371, and subsection (c) of the Act, respectively.

violation of the Act and in violation of the Constitution. The motion in terms takes the points (1) that Congress did not intend the "taker" of money in a bank robbery to suffer additional punishment for receiving, etc., the same money, and (2) the lesser offense of "receiving" the stolen money is "merged" into the greater offense of aggravated bank robbery. It is clear, however, from the memorandum accompanying and filed with his motion that petitioner, pleading without aid of counsel, was also raising "the constitutional prohibition against subjecting a defendant to more than one punishment in the federal courts for the same offense . . ." (R. 18).

ARGUMENT

Subsections (d) and (c) of Title 18, U.S.C. 2113 Do Not Authorize Double Punishment for the "Taking" and the "Receiving" of Identical Money in a Single Bank Robbery.

(A)

THE TERMS OF THE STATUTE

One who robs a bank, in so doing both takes and receives and possesses the stolen money. Therefore, a common sense reading of subsections (d) and (c) of the Act indicates a Congressional intent to punish a bank robber also as a "taker" of the stolen money. One not a "taker" and who after the felonious taking is completed deals with the stolen money, knowing it to have been stolen, is punished in the same manner as the taker. Such a one—a "receiver" of stolen money—is not himself a "taker" and is not punished as a "taker".

It is unreasonable to assume that Congress provided a 25 year maximum sentence for one who completes a bank

robbery thereby taking and receiving stolen bank funds, and then provided for an additional ten year sentence for the same receiving. The possibility of maximum punishment (25 years) under subsection (d) of the Act attached the moment petitioner completed the robbery and thereby also committed an act of taking. As a "taker" he of course knew the funds to be stolen and "received" them as such.

In some respects the Act does deal with various stages of a typical bank robbery: This, however, does not mean that the criminal who succeeds in his unlawful enterprise to the extent of accomplishing more than one phase of it, as the statute defines the phases, can be punished for more than one crime. The Fifth Circuit's incorrect view[4] to that effect was set aright in *Prince* v. *U. S.*, 352 U.S. 322, 77 S.Ct. 403.

(B)

The Legislative History and Prince v. U. S., 352 U.S. 322, 77 S.Ct. 403

Legislative history of the Act is limited. Accordingly, as this Court's recent inquiry has shown, such history throws little light upon the problem of whether crimes "incidental to and related to thefts from banks" are collectively punishable in a typical bank robbery situation. Cf. *Prince* v. *U. S.*, 352 U.S. 322, 323, 77 S.Ct. 403, 404.

The original Bank Robbery Act (48 Stat. 783) was passed in 1934 to cover only robbery, robbery accompanied by an aggravated assault, and homicide perpetrated in committing a robbery or in subsequent escape. In 1937 amendments were enacted "to add other crimes less serious than robbery." *Id.* at 326; 405. The list of these less serious crimes was further augmented by the amendment of 1940,

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[4] *Prince* v. *U. S.*, 5 Cir., 230 Fed. 2d 568, 570.

54 Stat. 695, adding subsection (c) with which we are here concerned. As presently constituted, the Act without substantial change derives from Title 12 U.S.C. (1946 ed.) Sec. 588 (a), (b) and (c).

It is now settled that each violation of the Act's proscriptions of less serious crimes cannot serve as a basis for a separate sentence to run consecutively with sentence for the related completed crime of robbery. Clearly, subsection (a) cannot do so; that provision respecting unlawful entry was inserted only to cover the situation where a person enters a bank for the purpose of committing a robbery, but is frustrated for some reason before completing the crime. *Id.* at 328; 406.

In like manner, we submit, the provisions of subsection (c) respecting receipt, possession or disposition of funds stolen from a bank must be deemed to have been inserted to cover only an individual not involved in the actual robbery but who becomes involved thereafter with the fruits of the felony.

Prince found no reason to assume Congressional intent to pyramid penalties for a lesser offense (unlawful entry) preceding robbery. There is no more reason here to assume Congressional intent to pyramid penalties for a lesser offense (receipt and disposition of stolen property) following robbery. One lesser offense as much merges into the completed major crime of robbery as does the other.

The amendment of 1937, in making unlawful entry into a bank a separate offense, of course in a sense implemented the Act. That is precisely the end accomplished by the amendment of 1940 in making receipt and handling of stolen bank property a separate offense. In the one, Congress extended the net to would-be robbers who fail of their purpose prior to a robbery. In the other, Congress likewise reached those who have not actually robbed but

who become involved with stolen bank funds after a robbery.

Neither amendment included a new and separate penalty clause. They are both related to the principal act of bank robbery, for which Congress designed major punishment. One amendment simply deals with problems arising before, the other with problems arising after, that principal criminal act.

Actually, the legislative history of the 1940 amendment, more clearly than in the case of the 1937 amendment, indicates Congressional concern "only with proscribing additional activities and not with alteration of the scheme of penalties." Cf. *Prince, supra*, footnote 10.

Senate Report No. 1801, 76th Cong., 3rd Session, recommended the enactment of the 1940 amendment which added subsection (c) to the Act. That report, and the companion House Report,[5] both set out an accompanying letter from the Attorney General suggesting passage of the subsection. The Attorney General's letter does not indicate any departure from the purpose which had inspired the 1937 amendment. His purpose had been only to add other crimes less serious than robbery. Indeed, Senate Report No. 1801 itself is definitively captioned "Punishment for Receivers of Loot From Bank Robbers" and in its body states "This bill would add another subsection to further make it a crime, with less severe penalties (maximum $5,000 and 10 years imprisonment or both) to wilfully become a receiver or possessor of property taken in violation of the statute." Thus, subsection (c) was not designed to authorize any change in the punishment for ~~him who robs~~; it only provided punishment for one who receives loot from the robber.

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[5] House Report No. 1668, 76 Cong. 3rd Session. There were no Congressional debates upon the bill which became subsection (c).

As *Prince* v. *U. S.* explains, one who at the same time violates subsection (a) of the Act by entry and subsections (b) or (d) by completing a robbery, is subject to but one sentence. Comparably to the conclusion reached in *Prince*, there is no reason here to assume Congress intended to make drastic changes in authorized punishment for one who completes a bank robbery and in so doing violates subsections (a) by entry, (b) or (d) by robbery, and (c) by receiving and handling the stolen funds.

At one stage of this proceeding, the Government itself has admitted that at least some of the proscriptions of the Act, i.e., in subsections (a), (b) and (d), will not each support a separate sentence.[6] The admission indicated agreement that the act of taking is not itself to be treated as an offense separate from a completed robbery. Whether such admission rests upon the doctrine of merger or upon presumed Congressional intent (Cf. discussion by the Fifth Circuit in *Prince* v. *U. S.*, 230 Fed. 2d 568, 571) certainly it tends to support our position here that an accused sentenced for bank robbery is not to be sentenced consecutively for separate phases of the same robbery.

(C)

In summary, petitioner rests his case largely upon what was held in *Prince*, and upon the characterization of the Act there spelled out.

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[6] See decision of Court of Appeals, Fifth Circuit, on original appeal, 223 F.2d 371, 376. Subsequent shifting of the Government's position on that admission, Cf. *Prince* v. *U. S.*, 352 U.S. 322, 327, f.n. 7, can at best serve only to emphasize an ambiguity in the Act. And since Congress has left "to the judiciary the task of importing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity . . . It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsh punishment." *Bell* v. *U. S.*, 349 U.S. 81, 83, 75 S.Ct. 620, 622.

It becomes unnecessary, therefore, to argue at length generalities of statutory construction which have been considered elsewhere in determining whether particular single transactions support consecutive sentences for violations of several statutory provisions.[1] "None of these is particularly helpful to us because we are dealing with a unique statute of limited purpose and an inconclusive legislative purpose." *Prince* v. *U. S.*, *supra*, at 325; 405.

Prince has declared that first feloniously entering and then robbing a bank, though violative of two of the Act's provisions, warrant but a single punishment. For virtually identical considerations, first robbing a bank and thereby receiving and then dealing with the spoils of the robbery, likewise warrant no more.

Petitioner's Multiple Sentences Subjected Him to Double Jeopardy

The construction of the Act which we urge, and which we submit is supported by the available legislative history and is inevitably suggested by *Prince*, avoids a serious constitutional question. Petitioner's double punishment for being at once both "taker" and "receiver" of the same stolen bank funds, has in a real sense subjected him to double jeopardy in violation of the Fifth Amendment.

A single bank robbery has been made to serve two prosecutions. (Cf. dissenting opinion of Douglas and Black, *JJ.*, concurring, *Gore* v. *U. S.*, 357 U.S. 386, 396, 78 S.Ct. 1280, 1285.) Such dual use of the same incriminating facts runs counter to the Founders' concern that an accused be protected against multiple punishment as well as against successive trials.

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[1] E.g., *Gore* v. *U. S.*, 357 U.S. 386, 78 S.Ct. 1280; *U. S.* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 73 S.Ct. 227; *Blockburger* v. *U. S.*, 284 U.S. 299, 52 S.Ct. 180.

Madison's original proposal in the House provided: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense . . ." (1 Annals of Congress 434.)[8] Later debate did not indicate entire abandonment of Madison's intention to protect against double punishment.

Recently, in *Green* v. *U. S.*, 355 U S. 184, 78 S.Ct. 221, this Court was not in agreement as to just how much illumination such constitutional history sheds upon the issue of retrial there involved. We suggest, however, that this history the more clearly supports petitioner's contention here that his double punishment amounts to double jeopardy. His contention has been aided by the construction already given to the Act as one principally designed by Congress to reach the crime of robbery with lesser elements of a consummated robbery merging into and constituting but a single offense with the robbery. *Prince* v. *U. S.*, *supra*. If petitioner's offense is one, and his sentences are multiple, his jeopardy is double. He has been made to suffer twice for what amounts to a single transgression.

The same sovereign cannot punish an accused twice for the same offense consistently with the double jeopardy clause of the Constitution. See *State of Louisiana* v. *Resweber*, 329 U.S. 459, 462; 67 S.Ct. 374, 375; *Ex Parte Lange*, 18 Wall. 163.

[8] See discussion in dissenting opinion of Mr. Justice Frankfurter, *Green* v. *U. S.*, 355 U.S. 184.

Conclusion

It is respectfully submitted that the judgment below should be reversed. Petitioner's motion should be granted and the cumulative sentence imposed upon him under subsection (c) of the Act should be vacated.

Respectfully submitted,

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